No. 89-1667

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

Jay Palmer, et al.,
Petitioners,
v.
BRG of Georgia, Inc., et al.,
Respondents.

PETITIONERS' RESPONSE TO THE AMICUS CURIAE BRIEF OF THE UNITED STATES

John C. Butters
(Counsel of Record)
P.O. Box 7129
Atlanta, Georgia
30357-0129
(404) 872-5693

Of Counsel:
James F. Ponsoldt
Professor of Law
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-5209

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Introduction

Petitioners are gratified that both the Department of Justice and the Federal Trade Commission agree that this Court should grant the petition for certiorari, summarily reverse the court of appeals'

decision, and remand the case for further proceedings, Brief for the United States as Amicus Curiae at pp. 16, 19: "Because the Court of Appeals' opinion can, and likely will, be read to restrict very substantially the scope of the per se rule, it poses a threat to the proper enforcement, both public and private, of the antitrust laws," id., at 16 (citation omitted).

Petitioners' "Reply in Support of Certiorari," at pg. 9, citing Catalano Inc. v. Target Sales, Inc., 446 U.S. 643 (1980), had recognized the appropriateness of summary reversal in this case since, as the United States also has concluded, the court of appeals' majority opinion is "in sharp and unexplained conflict with clearly

established law," Brief for the United States, at p. 7.

Petitioners submit this response for two purposes: First, to suggest clear terms for this Court's Order of remand which would be appropriate and promote an efficient resolution of this litigation; and, second, to reemphasize the importance to private antitrust enforcement of the second and third questions presented by the petition[1]. The court of appeals decision in its entirety should be reversed and remanded.

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[1] Since the United States in its enforcement role is most directly concerned about the lower courts' interpretations of the per se rule under Section One of the Sherman Act, the government perhaps has slighted the importance of the second and third questions to private antitrust enforcement.

Discussion

1. As the government's amicus brief notes, pp. 4-5, petitioners moved in the district court for partial summary judgment, limited to the question of liability, on the price-fixing and market allocation counts, under Section One of the Sherman Act. On appeal to the Court of Appeals, petitioners contended that defendants had not met their burden of opposing summary judgment, because they failed to raise any genuine issue of material fact in their affidavits and briefs in opposition to plaintiffs' motion.

Plaintiffs' Section One price-fixing and market allocation case was evidenced by, among other things, the terms of a written contract, defendants' admissions

in their pleadings regarding their competitive relationship and private discussions in 1980, and marketing documents describing the subsequent and continuing effect upon price, output, and competition. Defendants did not and could not contest any of that evidence. Instead, defendants advanced two legal arguments: that their conspiracy was not the kind of price-fixing or market allocation subject to the per se rule, and that their conspiracy was vertical, rather than horizontal, because their agreement required HBJ to cease selling at retail in Georgia.

As the amicus brief of the United States recognizes, those arguments are not supportable, Brief of the United States, pp. 7-10, 12: the per se rule

plainly does apply to respondents' combination, and the acknowledged competition between the conspirators at the time of their 1980 meetings renders their combination "horizontal" as a matter of law. See, e.g., Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988).

As effectively acknowledged in the Brief of the United States, the only "genuine" issue which defendants theoretically might have advanced in opposition to Summary Judgment -- a mixed question of law and fact -- would have been whether their 1982 contract modification constituted a withdrawal or abandonment of their unlawful conspiracy. The defendants, however, never raised such a question in opposition to

petitioners' motion for summary judgment (See, Defendants' Memorandum In Opposition To Plaintiffs' Motion For Partial Summary Judgment, filed May 14, 1986, R2-15), and the issue was never addressed by the district court or court of appeals majority. In view of the defendants' failure to raise a genuine factual issue, which was their obligation, the district court should have granted petitioners' motion as a matter of law, and the court of appeals erred in not so concluding, Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

The amicus brief of the United States does not make clear exactly what "further proceedings," Brief, p. 16, are appropriate in this case and implies that it "would suffice" if this Court simply

reverses and remands after confirming the applicable principles of per se liability, presumably leaving it to the court of appeals to decide what steps to take. However, in light of the existing uncertainty in the court of appeals, where the deciding vote in the panel decision was cast by a visiting district court judge, litigation efficiency would be promoted if the district court were directed specifically to reconsider whether the defendants adequately carried their burden in responding to plaintiffs' summary judgment motion. This Court, perhaps, should even go one step further, in light of the unambiguous defect of defendants' failure to assert withdrawal, and direct that plaintiffs' motion be granted.

2. The United States advocates granting certiorari on the first question presented in the petition for certiorari (amicus brief, pg. 19). The government does not argue, however, that the court of appeals majority correctly decided any issue. In the interest of uniform private antitrust enforcement, petitioners urge that this Court grant certiorari with respect to each of the three questions. This Court may wish to endorse the dissenting opinion of Judge Clark, below, Pet. App. 61-129, as an accurate statement of the law.

If this Court decides to grant plenary review of the case, contrary to the government's advice, it should do so with respect to all three questions presented. First of all, as the United

States, itself, recognizes, amicus brief, pp. 11, 12, 16, 18, resolution of the substantive Sherman Act issues may be affected by application of the Summary Judgment Rule. The panel majority's failure to apply the correct summary judgment standard, and its failure to consider uncontradicted evidence submitted by petitioners in opposition to summary judgment, as described in the dissenting opinion below, make this Court's resolution of any ambiguities in this dispute much simpler.

Second, the United States does not acknowledge that petitioners relied upon Rule 10.1(a) of the Rules of this Court -- authorizing this Court to exercise its supervisory authority over the lower federal courts -- as a basis for granting

review of the summary judgment issues presented. Thus, even though those issues may not be as important to the government's law enforcement efforts as are the issues subsumed within question one, the appropriateness of this Court's review is equally apparent: the glaring disparity in the descriptions of the record between the majority and dissenting opinions demonstrates that something was seriously amiss in the court of appeals, warranting correction.

The summary judgment standard applied by the majority -- requiring the party opposing summary judgment to eliminate all conflicting hypotheses of innocence in order to obtain a jury trial -- is not consistent with Rule 56, F.R.Civ.P. or the Seventh Amendment.

See, most recently, In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 441, (9th Cir. 1990) ("... [T]he concerns highlighted in Matsushita, and Monsanto arise only in the context of whether to permit inferences from circumstantial evidence. Accordingly, the Matsushita standards do not apply when the plaintiff has offered direct evidence of conspiracy."). See, also, Sullivan and Hovenkamp, 1990 Supplement to Antitrust Law, Policy, and Procedure, Cases Materials, Problems, The Michie Company (1990), at pg. 51. Sullivan and Hovenkamp, commenting upon the lower Court's decision in this case, recognize its troublesome and irrational

implications.[2]

Conclusion

This Court should grant certiorari and summarily reverse and remand with instructions that the District Court determine whether defendants raised a genuine issue of material fact in opposition to plaintiffs' motion for

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[2]"Clearly, the Matsushita summary judgment standard was designed for plaintiffs who must prove an agreement on the basis of circumstantial evidence. What if there is explicit evidence of a written agreement? The Eleventh Circuit has found an explicit territorial division agreement to be legal, because the resulting conduct (one party operating in one territory and the second party in a different territory) was as consistent with competition as with collusion. By that reasoning, an explicit price fixing agreement would be legal too, would it not? A group of people charging the same price is as consistent with perfect competition as it is with collusion. See Palmer v. BRG of Georgia, 874 F.2d 1417 (11th Cir. 1989)."

partial summary judgment. Alternatively, this Court should order, based upon the pleadings and record in the District Court, that plaintiffs' motion for partial summary judgment be granted.

Respectfully submitted,

John C. Butters
(Counsel of record)
P.O. Box 7129
Atlanta, GA
30357-0129
(404) 872-5693

Of Counsel:

James F. Ponsoldt
Professor of Law
University of Georgia
School of Law